87-262

Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

****

Case #_____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

In the Matter of

JOHN J STANTON,
Petitioner,

A Member of the Bar
of the United States
District Court for the
District of Columbia

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

John J Stanton
1901 Columbia Road NW
Washington, DC 20009
Phone (202) 232-5369

****

QUESTIONS PRESENTED

1. Under Selling v Radford, 243 US 46, 37 SCt 377 (1917), may a federal court impose reciprocal (identical) discipline on attorneys disciplined in state proceedings where the court rules on motions challenging disciplinary charges as vague, overbroad, or inadequate for fair notice after the factfinding hearing on the charges?

2. May a federal court impose reciprocal (identical) discipline on proof of violations of disciplinary rules construed by the state court to obligate attorneys to pursue client objectives "as they see them?"

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinion Below	v
Jurisdiction	v
Constitutional Provisions, Statutes, Regulations Involved	vi
Statement of the Case	1
Argument	5
1. The DC disciplinary motions procedure constitutes a deprivation of due process	6
2. The proof establishing misconduct as found by the DC court is unacceptable to a federal court under the duty to impose discipline only if constrained by principles of right and justice	12
3. The district and circuit courts should not be all- to adopt the DC disciplinary action	19
Conclusions	20

TABLE OF CONTENTS

(continued)

	Page
Appendix:	
Text of 26 March 1987 order, CADC Case #86-5148, summarily affirming district court reciprocal discipline order, accompanying memorandum ---------	1A
Text of 21 May 1987 order denying rehearing, CADC Case #86-5148 ----------	15A

TABLE OF AUTHORITIES

Cases:	Page(s)
Addington v Texas, 441 US 418, 99 SCt 1804 (1979) ----------	9
Hill v Lockhart, 106 SCt 366 (1985) ----------	16
Mathews v Eldridge, 424 US 319, 96 SCt 893 (1976) ----------	9
Minns v Paul, 542 F2d 899 (CA4 1976) ----------	13
Polk County v Dodson, 454 US 312, 102 SCt 445 (1981) ---------	14, 16

TABLE OF AUTHORITIES

(continued)

	Page(s)
In re Ruffalo, 390 US 544, 88 SCt 1222 (1968) ----------	5, 10, 15, 20
Selling v Radford, 243 US 46, 37 SCt 377 (1917) ----------	20
Smith v Goguen, 415 US 566, 96 SCt 1242 (1974) ----------	12
In re Stanton, 470 A2d 272, 281 (DC 1983) ----------	passim
In re Thies, 213 USAppDC 256, 662 F2d 771 (1980) ----------	10
Other:	
District of Columbia Code of Professional Responsibility, Disciplinary Rules,	
DR6-101(A)(3) ----------	2, 3, 4, 11, 12, 14, 15, 16
DR7-101(A)(1) ----------	2, 3, 4, 11, 12, 14, 15, 16
United States District Court for the District of Columbia,	
Local Rule 4-3(II)(d)---------	1, 3, 4, 6, 11, 18

OPINION BELOW

The yet unpublished 26 March 1987 order and memorandum of the United States Court of Appeals for the District of Columbia Circuit in Case #86-5148 is reproduced and appended to this petition.

JURISDICTION

Jurisdiction is invoked under 28 US Code 1254(1) for review of the reciporcal disciplinary order of the United States District Court for the District of Columbia in Case #AGD 84-3 affirmed summarily by order of the United States Court of Appeals for the District of Columbia Circuit in Case #86-5148.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"No person shall be ... deprived of life, liberty, or property without due process of law," Amendment 5, United States Constitution.

"A lawyer shall not ... neglect a legal matter entrusted to him," Disciplinary Rule DR6-101(A)(3), District of Columbia Code of Professional Responsibility.

"A lawyer shall not intentionally ... fail to seek the lawful objectives of his client through reasonably available means permitted by law," Disciplinary Rule DR7-101(A)(1), District of Columbia Code of Professional Responsibility.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

"Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (b) above, this Court, except as otherwise provided for below, shall impose the identical discipline unless the respondent attorney demonstrates, or this Court finds, that upon the face of the record on which the discipline in another jurisdiction is predicated it clearly appears:

(1) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) That proof establishing the misconduct gives rise to the clear conviction that this Court could not,

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

consistent with its duty, accept as final the conclusion of the disciplining court; or

(3) That the imposition of the same discipline by this Court would result in grave injustice; or

(4) That the misconduct established is deemed by this Court to warrant substantially different discipline.

When this Court determines that any of the above elements exist, it shall enter an order it deems appropriate," Local Rule 4-3(II)(d), United States District Court for the District of Columbia.

SUPREME COURT OF THE UNITED STATES

October Term, 1987

In the Matter of

JOHN J STANTON,
Petitioner,

A Member of the Bar
of the United States
District Court for the
District of Columbia

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

The United States District Court for the District of Columbia ordered petitioner, a member of its bar, to show cause under its then local Rule 4-3(II)(d) why he should not be disciplined to the same extent as by the District of Columbia (DC) Court of Appeals in In re Stanton, 470 A2d 272, 281 (DC 1983), in which that court in two proceedings had imposed discipline for several instances of

what it determined to be "neglect of a legal matter," DR6-101(A)(3), and "intentional failure to seek a client's lawful objectives," DR7-101(A)(1), id at 272, 282.

In response to the order to show cause, petitioner argued that the DC disciplinary procedure deprived him of due process by denying him an opportunity to be heard on his motion to dismiss the charges for lack of notice and that the proof of misconduct did not support the DC court's conclusion because the specific findings were mostly unsupported or speculative and, where supported factually, did not amount to disciplinary violations of which petitioner could have had fair warning. Petitioner's response demonstrated that the DC procedure forced him to defend against a petition of charges "so inadequate as not to allow him to know with what he was charged," 470 A2d at 285,

and that the DC court imposed discipline on unacceptable proof of violations of an obligation to seek or pursue client objectives "as they see them," 470 A2d at 276, a vague, overbroad construction of DR6-101(A)(3) and DR7-101(A)((1). Petitioner thus demonstrated claims or defenses of Rule 4-3(II)(d)(1) procedural due process deprivation and of Rule 4-3(II)(d)(2) unacceptable proof.

The district court committee on grievances reviewed petitioner's response and recommended imposition of reciprocal (identical) discipline because it found the opinions of the DC court to be "particularly persuasive and effective" in disposing of petitioner's Rule 4-3(II)(d) claims. Petitioner protested that the DC court had ignored his claims, but the district court imposed reciprocal discipline, stating only that "none of the defenses raised by the respondent herein

has merit sufficient to bar the imposition of reciprocal discipline and none of the defenses provided by Rule 4-3(II)(d) of this court appears on the face of the record herein."

On appeal to the DC Circuit, petitioner moved for summary reversal and remand for findings and conclusions on his Rule 4-3(II)(d) demonstrations. The court of appeals denied petitioner's motion and affirmed summarily at the same time. The court determined that summary affirmance was appropriate because petitioner's argument that the district court failed to make an independent determination that reciprocal discipline should be imposed was without merit as the DC court in its opinions had rejected the procedural due process argument petitioner raised in the district court under Rule 4-3(II)(d)(1), and the district court had concluded, on the basis of the DC court's opinions, that

reciprocal discipline was appropriate.

Petitioner requested rehearing, suggesting that the summary sffirmance effectively overruled In re Ruffalo, 390 US 544, 88 SCt 1222 (1968), by approving and adopting both the DC procedure requiring disciplinary factfinding proceedings against attorneys not fairly notified of the charges against them and the DC construction of DR6-101(A)(3) and DR7-101(A)(1) obligating attorneys to seek client objectives "as they see them." But the court of appeals refused rehearing, and petitioner now applies here for review of the district court order imposing reciprocal discipline based on the opinions of the DC court.

ARGUMENT

One incongruity with imposing reciprocal discipline based on the

opinions of the DC court is that those opinions nowhere address petitioner's Rule 4-3(II)(d) claims. In rejecting without addressing petitioner's procedural due process argument, the DC court actually rejected "the several layers of procedural due process protections," 470 A2d at 285, in favor of what it calls "fundamental aspects of procedural fairness," id, and the DC court totally ignored petitioner's arguments raised first in his motion to dismiss the disciplinary charges and afterwards in the district court under his Rule 4-3(II)(d)(2) claim of unacceptable proof of violations of disciplinary rules vaguely and overbroadly construed.

1. The DC disciplinary motions procedure constitutes a deprivation of due process.

The opinions of the DC court show that petitioner argued that the disciplinary petition of charges against him was "faulty on its face," 470 A2d at 285, and

"should have been dismissed on its face," id at 284, for reasons unmentioned in the opinions. After the factfinding hearing on the charges, the DC court determined that "no fault appears on the face of the petition," ibid. According to petitioner's argument, the "fault" was the application of disciplinary rules unconstitutionally construed in the specified charges to deprive petitioner of fair notice. The DC disciplinary motions procedure shielded the charges from effective challenge.

The procedure effectuates a policy that disciplinary cases not "be decided on motions made before the hearing," 470 A2d at 284, on the factual merits of the charges. Instead, the factfinder recommends "what disposition should be made of any motions," id at 285, so that "any possible objection to the petition can be considered together with the factual record in the case," ibid. At that

point the DC court determines whether, during the factfinding proceedings, the attorney "was not fairly notified of the charges against him because the petition was so inadequate as not to allow him to know with what he was charged," ibid.

In making this determination, the DC court considers the factfinder's recommendation to grant or to deny a motion to dismiss for want of fair notice. A recommendation to deny the motion is a recommendation to consider the factual merits of the charges. A recommendation to grant the motion, on the other hand, is a recommendation to dismiss without factual findings, which could not be reliable where there is no fair notice and opportunity for explanation and defense. But even when recommending dismissal without findings the factfinder makes and reports findings, and the DC court considers the factfinder's recommended

dismissal together with not only "the factual record in the case" but also the factfinder's recommendation "as to the ultimate disposition on the merits," 470 A2d at 285, of the charges on the factual record. The DC court never explains how its factfinder reasonably can recommend an ultimate disposition on findings while at the same time recommending a dismissal without findings.

The purpose of procedural due process is to minimize the risk of erroneous or arbitrary decisions, Addington v Texas, 441 US 418, 425, 99 SCt 1804, 1809 (1979), Mathews v Eldridge, 424 US 319, 344, 96 SCt 893, 907 (1976). In the DC disciplinary process the motions procedure increases, if it does not maximize, the risk of error by providing for inconsistent recommended dispositions.

The manifold due process faults in this procedure reflect the DC court's treatment

of fair notice and opportunity for hearing as mere "questions of pleading and form," 470 A2d at 285. But the "several layers of procedural due process protections" exist not just in criminal cases, as the DC court suggests, but in all cases involving possible deprivation of property interests by government action. Bar disciplinary cases, of course, are "adversary proceedings of a quasi-criminal nature," Ruffalo, supra at 551, 88 SCt at 1226, and before a federal court gives conclusive effect to a state court finding of unfitness to practice, it must assure itself that the attorney received the due process expected in such proceedings, In re Thies, 213 USAppDC 256, 258, 662 F2d 771, 773 (1980), citing Ruffalo.

In this case the district and circuit courts professed to find such assurance somehow in the opinions of the DC court, perhaps in the statement that it would

have no hesitation in dismissing a case in which it determined that the attorney "was not fairly notified of the charges against him." Taking that statement at face value, a federal court could infer that petitioner must have had fair notice of the charges, or the DC court would have dismissed the disciplinary case against him, but that inference is unwarranted, for at least two reasons. First, the DC disciplinary process provides for factfinding regardless of fair notice, and any dismissal for want of fair notice would come logically before, not after the factfinding stage of the process, if fair notice were truly a purpose of the process. Second, on consideration of petitioner's Rule 4-3(II)(d)(2) claim of unacceptable proof, it is clear that he could not have had fair notice or warning that his conduct for which the DC court imposed discipline violated disciplinary

rules DR6-101(A)(3) or DR7-101(A)(1).

2. The proof establishing misconduct as found by the DC court is unacceptable to a federal court under the duty to impose discipline only if constrained by principles of right and justice.

In Smith v Goguen, 415 US 566, 94 SCt 1242 (1974), the court referred to "the benefit of judicial clarification," id at 573, 94 SCt at 1247, of statutory language in setting "reasonably clear guidelines for law enforcement officials and triers of fact in order tp prevent arbitrary and discriminatory enforcement," ibid. This case depicts the danger of judicial obfuscation of the language of DR6-101(A)(3) and DR7-101(A)(1) to prosecute unconstitutional disciplinary action.

The DC court construed DR6-101(A)(3) and DR7-101(A)(1) to impose on attorneys a "duty of fidelity to the client's judgment," 470 A2d at 289, and a concomitant obligation to pursue client

objectives "as they see them," 470 A2d at 276. This new construction changed DC law, which previously resembled the federal domain, in which attorneys have "unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced," Minns v Paul, 542 F2d 899 (CA4 1976). Under DC law the attorney now "may not substitute his own judgment for that of the client," 470 A2d at 277, on "fundamentally important decisions on which the client's views must prevail," 470 A2d at 289.

The DC court never distinguishes "fundamentally important decisions" from "exclusively legal or technical matters which are committed to the discretion of the lawyer acting on his client's behalf,"

ibid, to make the distinction between permissible and impermissible decisions clear, definite, and informative. In effect, the DC court has construed DR6-101(A)(3) and DR7-101(A)(1) in an "external effort to direct how the obligations to the client are to be carried out," Polk County v Dodson, 454 US 312, 327, 102 SCt 445, 454 (1981).

Applying the new construction, the DC court ruled that petitioner violated the disciplinary rules in one case when he "refused to file a bond review motion on behalf of his client in the face of her direct instruction to do so," 470 A2d at 286, and leter "insisted on telling the judge that he did not approve of his client's decision to plead guilty," 470 A2d at 291; in another when he "concluded that his client had been involved in the incident," 470 A2d at 290, "so informed the client," ibid, and advised his client

"not to take the stand but that he would try to knock down the government's case," id; in a third when the "sum total," 470 A2d at 275, of "failures" "to file a bond review motion," "to communicate," and "to investigate the facts," ibid, violated the disciplinary rules regardless of whether "any of these failures by itself would amount to a violation," id; and in a fourth when he would not assist his client in an "attempt to plead guilty," 470 A2d at 274, "and the case went to trial," ibid.

The DC court could cite "no precise precedents," 470 A2d at 291, for the misconduct established by its findings and no legal authority for its construction of DR6-101(A)(3) and DR7-101(A)(1), and petitioner had no notice, warning or reason to believe "that the courts would condemn the conduct," Ruffalo, supra at 554, 88 SCt at 1226, found to violate DR6-

101(A)(3) and DR7-101(A)(1) as construed by the DC court because that conduct had the approval of precedent authorities.

A decision not to file a motion may be based on the obligation "not to clog the courts with frivolous motions or appeals," Polk County v Dodson, supra at 323, 102 SCt at 452 (1982), citing ABA Standards for Criminal Justice, Commentary to 4-3.9.

By telling a judge of his disapproval of a mentally competent client's decision to plead guilty the attorney may accentuate the voluntariness of the plea, the long-standing test of its validity, Hill v Lockhart, 106 SCt 366, 369 (1985), rather than "thwart the client's achieving her lawful objective of pleading guilty," 470 A2d at 288, as the DC court dreads.

Advising the client not to take the stand but to "try to knock down the government's case" is sound strategy when the client's credibility is doubtful.

No attorney can anticipate when a "sum total" of imputed "failures" may amount to a violation of the disciplinary rules.

Assisting a client in an "attempt to plead guilty" or "in entering his plea," 470 A2d at 277, compromises both "the voluntariness of the plea," id at 276, and the attorney's constitutional role in providing the client with "assistance of counsel for his defense." Counsel should inform and advise the client but should not assist the client in the actual waiver of the right to defend.

The DC court found in the first case that the client "might theoretically have been released," 470 A2d at 286, had petitioner filed her requested motion. In the second case it found that petitioner, who planned to "knock down the government's case," determined "that no investigation was necessary," id at 291, although he "had a half-hour

telephone conversation with the Assistant United States Attorney in charge of the case," id at 290, and he "intended to interview the complaining witness," ibid. In the third it found that petitioner "failed to communicate in any significant fashion with his client," 470 A2d at 275, although the client "asked him to speak to the US Attorney's Office about a plea bargain," id at 273, and petitioner "did so at that time," id at 274. In the fourth case the DC court by sheer speculation found that the client's confusion or uncertainty about pleading guilty "could have been cleared up in a moment or two," id at 276.

As petitioner demonstrated to the district court under Rule 4-3(II)(d)(2), such findings are unsupported, speculative, or, where supported factually, unacceptable as proof of disciplinary violations of which he could

have had fair notice or warning. Such findings are proof unacceptable to a federal court and cannot constrain it to impose discipline under the principles of right and justice.

3. The district and circuit courts should not be allowed to adopt the DC disciplinary action.

It is wrong and unjust for the DC Circuit to affirm its district court's adoption of procedure in which "the several layers of procedural due process protections are inappropriate," and only "fundamental aspects of procedural fairness" (a meaningless phrase) are observed. It is wrong and unjust to accept proof of violations of disciplinary rules construed to obligate attorneys to seek or pursue client objectives "as they see them." No other circuit, to petitioner's knowledge, has countenanced such a procedure or such a construction.

No other federal courts, to petitioner's knowledge, require attorneys on pain of discipline to file motions at clients' requests, to refrain from informing hearing judges of advice not to plead guilty, to pursue particular tactics and strategies, or to assist clients in articulating guilty pleas. Every other circuit appears to adhere to the precedents of Ruffalo, supra, and Selling v Radford, 243 US 46, 37 SCt 377 (1917), and to impose discipline only on fair notice with ample opportunity to be heard. The DC Circuit should be obliged to do the same.

CONCLUSIONS

Review should be granted, the judgment of the DC Circuiot should be reversed, and the reciprocal discipline order of the district court should be vacated. Any

further proceedings should include specific findings on petitioner's demonstrations of procedural due process deprivation and unacceptable proof of violations of disciplinary rules vaguely and overbroadly construed.

JOHN J STANTON
1901 Columbia Road NW
Washington, DC 20009
Phone (202) 232-5369

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5148 September Term, 1986

In the Matter of: AGD 84-3

John J Stanton, respondent,
a member of the Bar of the
United States District Court
for the District of Columbia,
Appellant

BEFORE: Bork, Silberman, and D H Ginsburg, Circuit Judges

O R D E R

Upon consideration of appellant's motion for summary reversal and the opposition and reply thereto and for the reasons set forth in the accompanying memorandum, it is

ORDERED by the court that the motion be denied. It is

FURTHER ORDERED by the court, on its own motion, that the district court orders of November 15, 1985 and January 21, 1986

be summarily affirmed.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See DC Cir Rule 14.

Per Curiam

No 86-5148 - In re Stanton

MEMORANDUM

John J Stanton, appellant, a member of the bar of the District of Columbia, was the subject of two disciplinary proceedings before the District of Columbia Court of Appeals (DCCA). In one proceeding, the DCCA found two separate acts of "neglect of a legal matter ...," DR6-101(A)(3), and two separate instances of "intentional failure to seek a client's lawful objectives," DR7-101(A)(1). See In re Stanton, 470 A2d 272, 272 (DC 1983). The court ordered that Stanton be suspended for a year and a day from the practice of law. Id. In the other proceeding, the DCCA found one instance of "neglect of a legal matter entrusted to him," DR6-101(A)(3)," and two acts of "intentional failure to seek a client's lawful objectives," DR7-101(A)(1). See In re Stanton, 470 A2d 281, 282 (DC 1983),

cert denied, 466 US 972 (1984). The court ordered that Stanton be suspended for 60 days from the practice of law. Id. The two suspensions were to be served concurrently. Id. In both cases, the court accepted the findings and recommendations of its Board on Professional Responsibility.

Stanton was also a member of the bar of the US District Court for the District of Columbia. The orders issued by the DCCA triggered reciprocal disciplinary proceedings by the district court pursuant to its then-Local Rule 4-3(II). Stanton, in response to the district court's order to show cause, claimed that reciprocal discipline should not be imposed. See Record Excerpt (RE) No 2. He argued "that the procedure in Ihis DCCA disciplinary proceedingI deprived him of due process, that the asserted proof of misconduct does not support the conclusion of the

disciplining court, and that grave injustice would result from acceptance of that conclusion as final by imposition of reciprocal discipline in this case." Id at 1. The committee on grievances of the district court reviewed the DCCA opinions and Stanton's response to the order to show cause and stated that "[t]he committee is of the view that reciprocal discipline should be imposed under Rule 4-3(II)(d) of the Rules of this Court." See RE No 3 at 1. The committee rejected Stanton's arguments:

> But respondent's memorandum fails to demonstrate that his proffered conclusions "clearly appear" "upon the face" of this disciplinary proceeding record as required by Rule 4-3(II)(d) of this court's Rules. The committee finds the opinions of the District of Columbia Court of Appeals to be particularly persuasive and effective in disposing of respondent's claims. In short, the record in this case simply will not support any demonstration, or any finding by this court, of such clearly apparent deficiencies in the disciplining of respondent.

> To the contrary, the record clearly supports the action taken against respondent.

Id.

In response, Stanton filed a "Motion to Strike or Recommit Response/Recommendation of Committee on Grievances." See RE No 4. Stanton argued that the committee's response "provides no more than four sentences of bare, unreasoned and unsupported conclusions and hortatory statements for its recommendation of unprecedented reciprocal discipline and is inadequate and unsuitable for use in rendering an adequately informed, independent judgment." Id. The committee responded, disputing Stanton's allegations that their recommendation was unreasoned and unsupported:

> The committee remains of the view that reciprocal discipline should be imposed under Rule 4-3(II)(d) of the Rules of this court. In short, this committee reaffirms the response filed by this

committee on April 17th, 1985.

RE No 5 at 2.

On November 15, 1985, the district court denied Stanton's motion to strike or recommit and suspended Stanton from the practice of law in the district court for a period of a year and a day, effective nunc pro tunc as of June 22, 1984. The court further ordered that the suspension shall remain in effect until further order of the DCCA terminating his suspension. See RE No 6. It stated:

> The court has carefully considered the respondent's motion to strike or recommit response/recomendation of committee on grievances, the response of the committee on grievances thereto and the respondent's reply and the entire record herein and has determined that the respondent's motion to strike or recommit response/recommendation of committee on grievances should be denied.
>
> Further, the court finds that none of the defenses raised by the respondent herein has merit sufficient to bar the imposition of reciprocal discipline and

> that none of the defenses provided by Rule 4-3(II)(d) of this court appears on the face of the record herein.

Id at 2.

On December 2, 1985, Stanton filed a motion to argue reconsideration of suspension order at oral hearing. See RE No 7. On January 21, 1986, the court denied the motion. See RE No 9. On February 19, 1986, Stanton filed a timely notice of appeal of the order of suspension and the denial of the motion for reconsideration.[1] He has now filed a motion for summary reversal of the

---

[1]Initially, there was some question as to whether the notice of appeal was timely. The notice would have been timely to appeal the order of suspension only if the motion for reconsideration was a Rule 59 motion rather than a Rule 60 motion. It was not clear whether the motion was timely served under Rule 59 because there was no attached certificate of service. This court, per Acting Chief Judge Wald, remanded the record to the district court to clarify this matter. The district court, on remand, certified the notice of appeal as having been timely filed.

district court order.

Summary disposition is appropriate when the merits of the case are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect our decision," Sills v Bureau of Prisons, 761 F2d 793-94 (DC Cir 1985). Stanton has not met his "heavy burden," id. at 793, that summary reversal is warranted. In fact, upon careful review of the record, we determine that summary affirmance is appropriate.

In Selling v Radford, 243 US 46 (1917), the Supreme Court examined the effect of disbarment from state court on membership in the bar of a federal court. The court held that a state disbarment order does not automatically bind a federal court. Id. at 50-51. Instead, it gives rise to a rebuttable presumption that an attporney lacks the "private and professional

character" to remain a member of the federal bar. Id. The court listed three conditions that would rebut the presumption:

> IWIe should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. that the state procedure from want of notice or opportunity to be heard was wanting in due process; 2. that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3. that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained to do so.

Id. at 51. The Supreme Court has reaffirmed this standard, see In re

Ruffalo, 390 US 544, 551 (1968); Theard v United States, 354 US 278, 282 (1957), and the district court codified this standard in its Local Rule 4-3(II)(d).

Stanton argues "that the district court denied him due process by failing to follow its own Rule 4-3(II)(d) in suspending him from the practice of law solely on the basis of the DC disciplinary action with no decision (findings and conclusions) on IhisI demonstrations under that rule in response to the order to show cause why the DC action should not be deemed lawful and conclusive." Motion for summary reversal at 4. Stanton claims that, in his response to the order to show cause, he raised legitimate arguments why district court should not impose identical discipline. Id. at 2. He argues that the district court could not impose identical discipline without specifically rejecting his arguments. Id. at 5.

In support of his argument, Stanton cites In re Thies, 662 F2d 771 (DC Cir 1980). In that case, this court vacated an order of the United States Tax Court disbarring Thies. The Tax Court had relied exclusively on Thies' automatic disbarment from the New York state courts following a felony conviction for assaulting a federal officer. Id. at 771-72. "The court's order citeIdI only the state disbarment and containIedI no findings other than a bare statement that the Selling v Radford criteria were satisfied." Id. at 773. This court held "that, in these circumstances, the Tax Court erred in its exclusive reliance on the state disbarment." Id. The court reasoned:

> The state court did not offer appellant the procedural guarantees specified by Selling v Radford. No hearing was held. Instead, the disbarment followed automatically upon Thies' felony conviction. Nor was the state's "conclusion on IThies'I character" supported by record-

> ed findings; the state made no factual findings whatsoever. Accordingly, we need not consider the third factor listed in Selling: whether under all the circumstances Thies' disbarment from federal court would violate principles of "right and justice."

Id. at 773-74.

We disagree with Stanton's arguments. The district court specifically stated that it considered the record and all submissions by the parties and found "that none of the defenses raised by the respondent herein has merit sufficient to bar the imposition of reciprocal discipline and that none of the defenses provided by Rule 4-3(II)(d) of this court appears on the face of the record herein." The committee on grievances specifically found "the opinions of the District of Columbia Court of Appeals to be particularly persuasive and effective in disposing of respondent's claims." RE No 3 at 1. The DCCA order and the report of its

Board on Professional Responsibility were thorough, and the court concluded, on the basis of those opinions, that imposition of reciprocal discipline was appropriate. In addition, the DCCA and its board rejected the procedural due process arguments that Stanton raised in the district court. See In re Stanton, 470 A2d 281, 282 n 2, 284-286 (DC 1983), cert denied, 466 US 972 (1984). The district court and its grievance committee were persuaded by the DCCA's rejection of these arguments. Finally, this case is distinguishable from In re Thies, 662 F2d 771 (DC Cir 1980); in this case, the DCCA and its board held hearings and made factual findings.

Because Stanton's argument that the district court failed to make an independent determination that reciprocal discipline should be imposed is without merit, we summarily affirm the district court orders.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5148 September Term, 1986

In the Matter of:

John J Stanton, respondent,
a member of the bar of the
United States District Court
for the District of Columbia

BEFORE: **BORK**, **SILBERMAN**, and **D H GINSBURG**, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, it is **ORDERED**, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A FISHER, CLERK

BY:

Robert A Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-262

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

IN THE MATTER OF

JOHN J. STANTON,

PETITIONER.

BRIEF OF THE COMMITTEE ON GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

HERBERT J. MILLER, JR. *
Chairman of the Committee
on Grievances
2555 M Street, N.W., Suite 500
Washington, D.C.. 20037
(202) 293-6400

*Counsel of Record

QUESTIONS PRESENTED

1. Whether procedural due process requires that motions challenging the legal sufficiency of disciplinary charges against an attorney be ruled upon at any particular time in the course of the disciplinary proceedings other than simply before any discipline is imposed?

2. Whether a state court's disciplining of an attorney for his persistent practice of disregarding his clients' wishes either by neglect or by interfering in matters as fundamental as the client's decision to plead guilty constitutes a sufficient basis for the imposition of reciprocal discipline by a federal court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

STATEMENT OF THE CASE.....1

1. The Facts Underlying The Disciplining Of Petitioner.....2

   A. Mr. Faison's Case.....3
   B. Mr. Johnson's Case.....7
   C. Ms. Benjamin's Criminal Cases.....10
   D. Mr. Johnson's Case.....15

2. Disciplinary Proceedings Against Petitioner In The District Of Columbia Court Of Appeals.....20

3. Disciplinary Proceedings Against Petitioner In The United States District Court.....24

4. Post-Disciplinary Proceedings....27

REASONS FOR DENYING THE WRIT.....29

I. Procedural Due Process Requires Only That Petitioner's Legal Challenges To The Disciplinary Proceedings Against Him Be Resolved Before Discipline Is Imposed, Not Necessarily At Any Earlier Point In The Proceedings.....31

II. The District Of Columbia Court of Appeals' Factually Supported Findings That Petitioner Persistently Disregarded His Clients' Wishes In Violation of His Ethical Obligations As An Attorney Are A Sufficient Basis For The Imposition Of Reciprocal Discipline.....35

CONCLUSION.....39

TABLE OF AUTHORITIES

Pages

CASES:

Armstrong v. Manzo, 380 U.S. 545 (1965).....33

Bates v. State Bar of Arizona, 433 U.S. 350 (1977).....38

In re Ruffalo, 390 U.S. 544 (1968)....33

In re Stanton, 470 A.2d 272 (D.C. App. 1983).....passim

In re Stanton, 470 A.2d 281 (D.C. App. 1983).....passim

Paratt v. Taylor, 451 U.S. 527 (1981) 32

Selling v. Radford, 243 U.S. 46 (1917) 36

Sills v. Bureau of Prisons, 761 F.2d 792 (D.C. Cir. 1985).....29

STATUTES:

28 U.S.C. § 2254.....34

28 U.S.C. § 2255.....34

OTHER AUTHORITIES:

Fed. R. Crim. Proc. 29(c).....34

Fed. R. Crim. Proc. 33.....34

Fed. R. Civ. Proc. 59.....34

Fed. R. Civ. Proc. 60.....34

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-262

IN THE MATTER OF

JOHN J. STANTON,

PETITIONER.

BRIEF OF THE COMMITTEE ON GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Noticeably absent from petitioner John J. Stanton's ("petitioner") request that this Court review the United States District Court for the District of Columbia's decision to impose reciprocal attorney discipline upon him is any detailed discussion of the facts that led

to the decision to discipline him in the first instance. We begin our statement of the case with a recitation of those critical facts, and then turn to the disciplinary proceedings based upon them.

1. The Facts Underlying The Disciplining Of Petitioner

The problems petitioner now seeks to have this Court review all arise out of his representation of four clients in criminal matters: Mr. Faison, Mr. Johnson, Ms. Benjamin and Mr. Wilson. We quote verbatim below, except as otherwise indicated, the pertinent discussion of each of these representations from the reported opinions of the District of Columbia Court of Appeals in In re Stanton, 470 A.2d 272 (D.C. App. 1983) and In re Stanton, 470 A.2d 281 (D.C. App. 1983). See 470 A.2d at 273-274, 274, 283-284 & 289-290, respectively. These critical opinions, which literally

underlie this entire case, are conspicuously absent from petitioner' s appendix to his petition for a writ of certiorari.

A. Mr. Faison's Case

In June 1981, Mr. Faison was arrested on a felony charge. At this time there were already two misdemeanor charges pending against Faison, and shortly thereafter another misdemeanor bail-jumping charge was lodged against him for failure to appear at a hearing in one of the misdemeanor cases. [Petitioner] was appointed as Faison's counsel in the felony case and in the misdemeanor bail-jumping case on June 13, 1981. On that day bond was set at $3,000 for both the felony and misdemeanor bail-jumping charges. A $5,000 bond had been set previously in each of the two pending misdemeanor cases. During the week of June 13, Faison twice requested

[petitioner] to file a bond review motion and in the ensuing three weeks made efforts to discuss his case with [petitioner]. [Petitioner] did not file such a motion and did not discuss the case with Faison.

At the urging of Faison's girlfriend, [petitioner] made an unsuccessful attempt to reach Faison by telephone at the jail in late June. On June 25 Mr. Verrone, Faison's counsel in one of the misdemeanor cases, filed a bond review motion in which, among other things, he gave an explanation for Faison's failure to appear at the May 12 hearing which resulted in his bail-jumping charge. This motion was granted on July 1, and the bond was reduced to $2,500. 1/

1/ In September this bond was consolidated with the bond in Faison's other misdemeanor case, which was also reduced to $2,500.

On July 6, 1981, [petitioner] conferred with Mr. Verrone about the status of the case that he was handling and the possibility of a plea bargain covering all three of the misdemeanor cases. This conversation and the attempted phone call to Faison at the jail were the only things done by [petitioner] on behalf of Faison after the preliminary hearing in the felony case on June 19, 1981, until July 7, 1981.

On July 7 when Faison was in court for a status call in his misdemeanor cases, he talked to [petitioner] and asked him to speak to the U.S. Attorney's office about a plea bargain in the felony case. [Petitioner] did so at that time, but the Assistant U.S. Attorney was not prepared to make a plea agreement. When Faison and [petitioner] met in the cellblock on July 7, Faison informed [petitioner] that he had filed a complaint the previous day

with Bar Counsel concerning [petitioner's] failure to render assistance to him.

On July 14, 1981, Bar Counsel informed [petitioner] by letter that he was in an adversary relationship with his client and should seek permission to withdraw. On July 18 [petitioner] rejected Bar Counsel's request that he seek permission to withdraw.

Faison was arraigned on an indictment returned in the felony case on July 29; [petitioner] was absent due to illness and another attorney represented Faison. The felony case was continued to August 27 for a status hearing. In the meantime Faison had filed pro se motions for bond review and for discovery.

There was no communication between Faison and [petitioner] after July 7, except for a meeting in the courthouse cellblock on July 24 when Faison was there for a status conference on his misdemeanor

cases. [Petitioner] did nothing on Faison's behalf after July 7.

Sometime prior to the August 27 status hearing, the court removed [petitioner] and appointed new counsel for Faison.

[On the basis of the foregoing facts, Bar Counsel brought charges against petitioner of] "neglecting a legal matter entrusted to him [DR 6-101(A)(3)] and intentional failure to seek a client's lawful objectives [DR 7-101(A)(1)]." 470 A.2d at 273.

B. Mr. Johnson's Case

Mr. Johnson was arrested on October 2, 1980, on a warrant charging petty larceny. As a result of a search conducted at the time of the petty larceny arrest, he was also charged with violation of the Dangerous Drug Act. On that same day [petitioner] was appointed to represent Johnson in both of these cases.

At a preliminary hearing on the drug case on October 30, 1980, the prosecutor offered to drop one of the two charges against Johnson if he would enter a guilty plea to the other. On [petitioner's] advice, the offer was declined. Both cases were assigned to Judge Hess who set the petty larceny case for trial on May 28 and the drug case for trial on June 4, 1981.

[Petitioner] was not present when the larceny case was called for trial on May 28 because of his attendance in another courtroom. Based on mistaken information as to the reason for [petitioner's] absence, Judge Hess removed [petitioner] from the larceny case and appointed attorney Jankovich to represent Johnson in the larceny case which was continued.

The drug case came on for trial on June 4, 1981. After the jury had been impanelled, Johnson sought to enter a plea

of guilty. During Johnson's attempt to plead guilty, [petitioner] limited himself to urging Johnson to tell the court what it was that Johnson wanted. Other than responding to the court's inquiry concerning how much investigation [petitioner] had performed, [petitioner] said nothing to the court in aid of Johnson's attempted plea and, so far as the record shows, said nothing to Johnson except to urge Johnson to tell the court what was on his mind.

The judge declined to accept Johnson's plea on account of Johnson's apparent confusion, and the case went to trial, which resulted in Johnson's being found guilty. At the conclusion of the trial, Judge Hess removed [petitioner] as counsel for Johnson and, on June 24, 1981, vacated the jury verdict.

Johnson was committed to jail at the conclusion of the trial. Later, Johnson

did plead guilty in the larceny case, and the drug case was dropped. Johnson was then sentenced to sixty days with credit being given for the time already served. Since the time Johnson had served by then exceeded sixty days, Johnson was released at the time of his sentencing.

[Based on the foregoing, Bar Counsel charged petitioner with] "neglecting a legal matter entrusted to him [DR 6-101(A)(3)], intentional failure to seek a client's lawful objectives [DR 7-101(A)(1)] [and] conduct prejudicial to the administration of justice [DR 1-102(A)(5)]." 470 A.2d at 273.

C. Ms. Benjamin's Criminal Cases

Ms. Benjamin had two criminal cases pending against her in the Superior Court at the same time. The first, which [was] labeled the "underwear case," was based on a charge of attempted larceny of assorted underclothing from Hecht's department

store. [Petitioner] was appointed to represent Ms. Benjamin in the underwear case.

The second case, which [was] labeled the "crabmeat case," was also a charge of attempted larceny. Ms. Benjamin was represented by other counsel, particularly Mr. Bright, in the crabmeat case.

It was uncontested in the record before the Hearing Committee that at the time of Ms. Benjamin's arraignment on the underwear case, her bond was set at $1,000 with a 10% payment. Not having the requisite $100 to secure her release, Ms. Benjamin was incarcerated. It is also uncontested that Ms. Benjamin sent [petitioner] a letter requesting him to file a bond review motion for her. Her request was unequivocal.

[Petitioner] did not answer Ms. Benjamin's written request. A few days later Ms. Benjamin telephoned [petitioner]

from the District of Columbia Jail and renewed her request to him to file a bond review motion.

[Petitioner] admits that after the letter and the telephone conversation outlined above, he did not prepare or file a bond review motion or make any other effort to obtain Ms. Benjamin's release from the District of Columbia Jail by helping her to secure the necessary $100. Consequent to [petitioner's] inactivity, Ms. Benjamin remained in the District of Columbia Jail for seventeen days until her son, who had been out of town, returned to Washington and posted the requisite $100.

After Ms. Benjamin's release, [petitioner] received a plea offer from the United States Attorney. Her two sets of lawyers disagreed about the advisability of her accepting the government's plea offer. The lawyers

representing Ms. Benjamin on the crabmeat case concluded that acceptance of the government's plea offer was in the best interests of Ms. Benjamin. [Petitioner], on the other hand, concluded that the plea offer was not in Ms. Benjamin's best interests and he so recommended to her.

[Petitioner] concedes that he had an adequate opportunity to urge his views upon Ms. Benjamin and that she was competent to make the decision whether to plead guilty. After consideration of the competing advice of her two sets of lawyers, Ms. Benjamin concluded that she wished to accept the government's plea offer. Accordingly, Ms. Benjamin's other lawyers arranged for a hearing before Judge Neilson on October 15, 1979, at which time Ms. Benjamin was to plead guilty in both the underwear and the crabmeat cases and to be sentenced.

At the hearing, [petitioner]

volunteered to the Court that he had advised Ms. Benjamin that the plea arrangement was "improvident and unwise" and [petitioner] asked Judge Neilson to take this fact into account in the Rule 11 proceeding that he was then conducting on Ms. Benjamin's attempts to plead guilty. Ms. Benjamin's plea was accepted over [petitioner's] objection, and she was sentenced.

As [a result of these facts], Bar Counsel brought a petition alleging three areas of misconduct: (1) in connection with the [petitioner's] failure or refusal to file a bond review motion, Bar Counsel charged him with neglect and with intentionally failing to seek the lawful objectives of his client; (2) in connection with [petitioner's] failure or refusal to assist Ms. Benjamin in accepting the government's plea bargain, Bar Counsel charged violations of the same

two Disciplinary Rules; and (3) Bar Counsel charged [petitioner] with failure to conduct meaningful communication and to provide assistance to his client amounting to a violation of the Disciplinary Rule prohibiting neglect.

D. Mr. Wilson's Criminal Case

[Petitioner's] client, Mitchell Wilson, and another man were arrested on June 8, 1980, and charged with assault with intent to commit robbery. [Petitioner] was originally assigned to represent Wilson, but, when Wilson was found to be ineligible for legal assistance under the Criminal Justice Act, [petitioner] was retained for the flat fee of $1000 -- $200 to be paid immediately, and $800 to be paid at the rate of $100 per month if Wilson was indicted. Wilson told [petitioner] that he had been identified as having assaulted the complaining witness in an alley about 3:45

a.m. He admitted being in the area, but denied knowing anything about the incident.

At a preliminary hearing held on June 19, 1980, [petitioner] learned that the complaining witness had told the arresting officer that he had torn the shirt of his assailant, and that, when arrested, Wilson was found to have a torn shirt stuffed in his pocket. Wilson told [petitioner] that his shirt had been torn earlier when he had played basketball with a friend, David Williams. Wilson gave [petitioner] Williams' address, but not his telephone number. Because of that fact, [petitioner] concluded that Wilson had no real interest in calling Williams, and that Williams was not a genuine witness.

[Petitioner] therefore made no attempt to contact Williams. 2/

The government offered to accept, before indictment, a plea of guilty to attempted robbery with the government not opposing Federal Youth Act Probation. Mitchell refused to plead guilty, asserting his innocence. On July 8, [petitioner] sent a letter to Judge Ugast stating that, if his client could be assured of a sentence under the Youth Act, he would recommend that the client plead guilty. That letter was not answered. [Petitioner] at that time had made no investigation of the case beyond talking

---

2/ Wilson also named two other persons, friends of his co-defendant, who, he said, could testify that he had been drinking at a bar near the place that the assault occurred. [Petitioner] concluded that even if the witnesses could be found, their testimony would not be helpful, and he therefore made no attempt to identify or interview them.

with his client and hearing the testimony of the officers at the preliminary hearing.

Wilson and his co-defendant were indicted and were arraigned on October 14, 1980. On November 13, [petitioner] testified, he had a half-hour telephone conversation with the Assistant United States Attorney in charge of the case. On November 17, after a status hearing, [petitioner] had a conference with his client, the co-defendant, and the co-defendant's attorney. [Petitioner] testified that, by that time, he had concluded that his client had been involved in the incident. He so informed his client. His advice was that the defendants not take the stand, but that he would try to "knock down" the governments' case. [Petitioner] testified that he intended to interview the complaining witness, but had not done so by January

16, 1981, although the trial was set for January 19, 1981.

On January 16, 1981, [petitioner] learned that Wilson had hired another attorney. He called Wilson and berated him, using offensive language. On January 19, 1981, the date originally set for trial, the case was postponed. [Petitioner] sought out Wilson's mother and berated her for Wilson's change of attorneys. The mother felt so harassed by [petitioner's] conduct that she complained to Bar Counsel, instituting the investigation which eventually led to the instant charges [of failing to obtain discovery, failing to keep his client informed of the progress of the case and failing to investigate the case.]

2. Disciplinary Proceedings Against Petitioner In The District Of Columbia Court Of Appeals

As provided in the rules established by the District of Columbia Court of Appeals, the specified charges of misconduct by petitioner based on the foregoing facts were first reviewed and then raised against him by Bar Counsel to the District of Columbia Bar. Bar Counsel prosecuted these charges against petitioner before a disciplinary Hearing Committee, which developed a full evidentiary record of the facts surrounding the charges and heard argument from the parties concerning the consequences of those facts. In Mr. Faison's case, "the Hearing Committee found a violation of DR 6-101(A)(3) and DR 7-101(A)(1)." 470 A.2d at 273. On the record in Mr. Johnson's case, the Hearing Committee discerned "a violation of only DR 6-101(A)(3)." Id. With respect to Ms.

Benjamin's cases, the Hearing Committee found, "on the bond review matter," that petitioner "had 'intentionally fail[ed] to seek the lawful objectives of his client through reasonably available means permitted by law' in violation of DR 7-101(A)(1)," 470 A.2d at 282-283, but concluded "that Bar Counsel had failed to make out a violation of DR 7-101(A)(1) . . . in connection with [petitioner's] failure to assist his client in entering her plea of guilty." Id. at 283. Concerning Mr. Wilson's case, the Hearing Committee concluded "that 'there is clear evidence that [petitioner] neglected his client's legal matter. Despite the client's repeated assertions of innocence, [petitioner] concluded that his client was guilty, and failed to investigate the case, as charged.'" Id. at 289.

As further provided in the local rules, the findings of the Hearing

Committee were forwarded to the Board on Professional Responsibility of the District of Columbia Court of Appeals ("the Board") for it to review and report on to the Court. Upon reviewing the record in petitioner's cases, the Board agreed with the Hearing Committee's findings on all matters, except those concerning the plea offer matters involving Mr. Johnson and Ms. Benjamin. See id. at 287-289. In both of those instances, the Board concluded, contrary to the Hearing Committee, that petitioner had in fact "violated the disciplinary rules when he intentionally failed to pursue his client's lawful objective[s]," 470 A.2d at 289; see id. at 273, and that he also erred in Ms. Benjamin's case by "interject[ing] his personal views in a forum where they had no place." Id. at 289. The Board also considered and rejected a number of legal arguments

raised by petitioner challenging the conduct of the disciplinary proceedings against him, see id. at 284-286, including his assertion that "the petition should have been dismissed [as defective] on its face" before any hearing was held on it. Id. at 284. On the basis of its conclusions, the Board recommended that petitioner be suspended from the practice of law for a period of a year and a day because of his misconduct in representing Mr. Faison and Mr. Johnson, see 470 A.2d at 281, and for a period of sixty days as a result of his misconduct in representing Ms. Benjamin and Mr. Wilson. See id. at 291-292.

Upon receipt of the Board's reports, the District of Columbia Court of Appeals, which has the final say on all matters of attorney discipline in the local courts, adopted the Board's findings and recommendations in all respects. Id. at

272 & 282. In an act of leniency toward petitioner, however, the Court ordered the sixty-day suspension "to be served concurrently with [the] suspension of a year and a day." Id. (emphasis added).

3. Disciplinary Proceedings Against Petitioner In The United States District Court

At the time that the above-described discipline was imposed on petitioner, he was also a member of the bar of the United States District Court for the District of Columbia, and the disciplinary orders issued by the District of Columbia Court of Appeals triggered a reciprocal disciplinary proceeding in that district court under its then-Local Rule 4-3(II). See Petitioner's Appendix ("Pet. App.") at 4a. This triggering led the district court to issue an order to petitioner to show cause why such reciprocal discipline should not be imposed on him. Id. Petitioner responded by arguing "that the

procedure in [his District of Columbia Court of Appeals disciplinary proceeding] deprived him of due process, that the asserted proof of misconduct does not support the conclusion of the disciplining court, and that grave injustice would result from acceptance of that conclusion as final by imposition of reciprocal discipline in this case." Pet. App. at 4a-5a.

The Committee on Grievances of the district court thoroughly reviewed petitioner's response to the Order To Show Cause, together with the above-described reported opinions by the District of Columbia's Court of Appeals concerning petitioner's misconduct, and came to "the view that reciprocal discipline should be imposed under Rule 4-3(II)(d) of the Rules of [the] Court." Pet. App. at 5a. The Committee also specifically rejected petitioner's defensive claims as follows:

> [R]espondent's memorandum fails to demonstrate that his proffered conclusions 'clearly appear' 'upon the face' of this disciplinary proceeding record as required by Rule 4-3(II)(d) of this court's Rules. The committee finds the opinions of the District of Columbia Court of Appeals to be particularly persuasive and effective in disposing of respondent's claims. In short, the record in this case simply will not support any demonstration, or any finding by this court, of such clearly apparent deficiencies in the disciplining of respondent. To the contrary, the record clearly supports the action taken against respondent.

Pet. App. at 5a-6a.

On November 15, 1985, following the recommendation of the Committee on Grievances, the district court suspended petitioner "from the practice of law in the district court for a period of a year and a day, effective nunc pro tunc as of June 22, 1984," Pet. App. at 7a, and "further ordered that the suspension shall remain in effect until further order of the [District of Columbia Court of Appeals] terminating his suspension." Id.

In so ruling, the district court expressly found "that none of the defenses raised by the respondent herein has merit sufficient to bar the imposition of reciprocal discipline and that none of the defenses provided by Rule 4-3(II)(d) of this court appears on the face of the record herein." Pet. App. at 8a.

4. Post-Disciplinary Proceedings

Unsatisfied with the results of either of the above-described disciplinary proceedings against him, petitioner, sought -- as was his right -- to appeal them both. First, he asked this Court to review, by certiorari, the decisions of the District of Columbia Court of Appeals finding him guilty of misconduct and imposing discipline on him in the first instance. See Stanton v. District of Columbia Court of Appeals, No. 83-1511. This Court refused to review those decisions by the District of Columbia

Court of Appeals, however, denying petitioner's petition for a writ of certiorari on May 14, 1984. See 466 U.S. 972.

Second, petitioner appealed the district court's decision to impose reciprocal discipline upon him to the United States Court of Appeals for the District of Columbia Circuit. See Pet. App. at 8a. Petitioner was so confident of the merits of this appeal that he asked the court of appeals to summarily reverse the district court's order of reciprocal discipline. Id. at 8a-9a. Instead, finding the appeal so completely lacking in merit, the court of appeals did exactly the opposite and summarily affirmed the district court. See Pet. App. at 9a. 3/

3/ In the District of Columbia Circuit, such summary affirmance is utilized only when the merits of the appeal are "so (Cont'd)

Petitioner followed this loss at the court of appeals with the instant petition to this Court.

REASONS FOR DENYING THE WRIT

The petitioner in this case asks this Court to review the imposition of discipline upon him because of his misconduct as an attorney. The decision to discipline petitioner has already been through four different levels of administrative procedure -- Bar Counsel, a Hearing Committee, the Board of Professional Responsibility and the Committee on Grievances -- and four different levels of judicial procedure --

---

clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the court's] decision." Sills v. Bureau of Prisons, 761 F.2d 792, 793-94 (D.C. Cir. 1985).

the District of Columbia Court of Appeals, this Court, the United States District for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. At every level and in every forum, petitioner's defensive claims, like those at issue here, have been thoroughly and completely rejected. There is no need for this Court to part company with this unanimous line of precedent and waste its resources any further on this matter. The issues raised by petitioner lack any merit whatsoever, and his case is of no national importance.

I. Procedural Due Process Requires Only That Petitioner's Legal Challenges To The Disciplinary Proceedings Against Him Be Resolved Before Discipline Is Imposed, Not Necessarily At Any Earlier Point In The Proceedings

The first issue raised by petitioner is purely a procedural one. He complains that he was deprived of due process when his legal challenges to the validity of

the disciplinary proceedings against him were not resolved until after the fact-finding hearing on the allegations against him. Significantly, petitioner does not argue on this petition that his legal challenges were never ruled upon or that the rulings on those challenges were in error. Instead, he simply alleges a process-oriented defect in the timing of those rulings, which allegedly rises to constitutional proportions.

There is no substance at all to this contention by petitioner. The Due Process Clause protects individuals against being "deprived of life, liberty, or property, without due process of law." U.S. CONST., AMENDS. V & XIV. Axiomatically, under this provision, due process concerns are not transgressed until there has been a deprivation. [4/] In the instant case, it is clear from the record of the proceedings that petitioner's legal

challenges to the validity of the proceedings against him were in fact ruled upon in the course of the administrative proceedings before any discipline was actually imposed on him. See 470 A.2d at 284-285. Because they were so ruled upon at that time, petitioner has had the opportunity to be heard "at a meaningful time and in a meaningful manner" that the Due Process Clause grants him. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Underlying petitioner's argument on this point is his inherent distrust of "after-the-fact" legal rulings on the validity of a proceeding that has already

---

4/ Indeed, this Court has on occasion gone even further than this plain language of the clause and held that, in some circumstances, due process concerns are not even violated as long as post-deprivation judicial process is available. See, e.g., Paratt v. Taylor, 451 U.S. 527 (1981).

taken place. Petitioner cites In re Ruffalo, 390 U.S. 544 (1968), as support for this suspicion, but in fact Ruffalo proves precisely the opposite. In Ruffalo, this Court held that an attorney could not be disciplined on a charge of misconduct revealed by the evidence at a factual hearing when the attorney had not been given notice of the possibility of that charge before the hearing. Id. at 550-552. Thus, even though the complained-of fact-finding hearing had already taken place, this Court had no difficulty properly ruling on the validity of Ruffalo's legal challenge to the validity of the charge against him. In fact, such "after-the-fact" rulings happen all the time in the federal courts. See, e.g., Fed. R. Crim Proc. 29(c) & 33; Fed. R. Civ. Proc. 59 & 60; 28 U.S.C. §§ 2254 & 2255. As long as the legal challenge is given full and fair consideration at some

point in the proceedings, [5] the timing of that consideration presents no occasion for constitutional concern.

---

[5] There is no basis in this record for questioning the fullness or the fairness of the eventual consideration given to such legal challenges in District of Columbia disciplinary proceedings. To the contrary, as the Board of Professional Responsibility noted in this case:

> [it] would have no hesitation in recommending dismissal of a case in which the respondent was not fairly notified of the charges against him because the petition was so inadequate as not to allow him to know with what he was charged, that determination is made at the Board level so that any possible objection to the petition can be considered together with the factual record in the case.

470 A.2d at 285. The policy underlying the local procedure in this regard is not to short shrift claimed legal defenses, but rather to expedite the whole hearing process because of the substantial and undeniable public interest involved in its speedy resolution. See id. at 284-285.

II. The District Of Columbia Court Of Appeals' Factually Supported Findings That Petitioner Persistently Disregarded His Clients' Wishes In Violation Of His Ethical Obligations As An Attorney Are A Sufficient Basis For The Imposition Of Reciprocal Discipline

Petitioner complains that his disciplining by the District of Columbia Court of Appeals provides an insufficient factual basis for the imposition of reciprocal discipline by the United States District Court for the District of Columbia. We believe the facts of petitioner's misconduct, as evidenced in the opinions of the Court of Appeals reproduced in our statement of the case, speak eloquently for themselves on this point and we will not address them further herein, but merely refer the Court to them. See pp. 3-19, supra. Suffice it to say, however, that the record in this case certainly does not present "such an infirmity of proof as to facts found to have established the want of fair private

and professional character as to give rise to a clear conviction on [this Court's] part that [it] could not consistently with [its] duty accept as final the conclusion on that subject." Selling v. Radford, 243 U.S. 46, 51 (1917).

Petitioner attempts to characterize the disciplinary findings against him as merely a wholesale abdication of the control of professional conduct to whatever the attorney's clients "see" as appropriate tasks for the lawyer to perform for them. Petition at 13. Neither petitioner's failures to investigate cases that he had been assigned, nor petitioner's failures to assist his clients in pleading guilty, nor petitioner's failures to file critical -- and demonstrably nonfrivolous -- motions when requested to do so by his clients or to communicate with them at all concerning his failure to do so, can be laid at the

feet of idiosyncratic clients attempting to overburden him with unreasonable work demands, as petitioner would like. The fact of the matter, and the simple truth emanating from the record of these proceedings, is that petitioner's preferred course of conduct in representing criminal clients in the Superior Court was simply to do nothing. His fundamental obligations to do more were not foisted upon him by the whimsical wishes of demanding clients, but were placed upon him instead by the rules of conduct developed to ensure the integrity of his profession. Petitioner willfully and repeatedly violated those rules, and he has no just cause to complain about being brought to task for it as a result.

Finally, as petitioner himself appears to concede, whatever peculiarities may exist, and we submit there are none, in the District of Columbia Court of

Appeals' interpretation of local attorneys' professional obligations to their clientele is purely a matter of "D.C. law." Petition at 13. As this Court has noted, "[t]hat court is the ultimate body wielding the State's power over the practice of law." Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977). There is no need for this Court to get embroiled in such fact-bound determinations of purely local concern.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HERBERT J. MILLER, JR.*
Chairman of the Committee
on Grievances
2555 M Street, N.W., Suite 500
Washington, D.C.. 20037
(202) 293-6400

*Counsel of Record

Dated: October 9, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member in good standing of the Bar of this Court and that I caused three copies of the foregoing Brief Of The Committee On Grievances Of The United States District Court For The District Of Columbia In Opposition To The Petition For A Writ Of Certiorari to be sent by first-class mail, postage prepaid, this 13th day of October, 1987 to:

John J. Stanton
1901 Columbia Road, N.W.
Washington, D.C.. 20009

Herbert J. Miller Jr (sic)
HERBERT J. MILLER, JR.